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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(San Joaquin)

RONALD MILLER,

Plaintiff and Appellant,

v.

CHARLES F. BUSH, SR. et al.,

Defendants and Respondents.

C065203

(Super. Ct. No.
CV022559)

This appeal of an attorney fee award requires us to decide whether the trial court properly awarded defendants their *attorney fees* after defendants prevailed in an earlier appeal and were awarded *costs* pursuant to California Rules of Court, rule 8.278(a)(1). The attorney fee award was based on defendants' having successfully defeated plaintiff's motion under Code of Civil Procedure¹ section 664.6 to enter judgment on a settlement agreement containing an attorney fee clause;

¹ Further unspecified statutory references are to the Code of Civil Procedure.

however, there was arguably never a separate "action" on the settlement agreement, as contemplated by Civil Code section 1717.

We hold that on the specific facts of this contorted and lengthy litigation, the fee award was proper, because (1) plaintiff's own failure/refusal to comply with the terms of the settlement by not moving for dismissal allowed him to avoid the requirement that he bring a separate "action" to enforce the agreement; and (2) in prosecuting his section 664.6 motion, plaintiff fully litigated his claims regarding the settlement agreement; thus the "motion" functioned as the equivalent of an "action" under these particular circumstances. Consequently, we shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Ronald Miller (Miller) appeals from the trial court's orders awarding attorney fees of \$9,918.75 to defendants Charles F. Bush, Sr., and Kathleen Bush (the Bushes), and denying his motion to strike the attorney fees from the Bushes' memorandum of costs.

This is Miller's fourth appeal in this matter, and we rely in large measure on our prior unpublished opinion in *Miller v. Bush* (Aug. 24, 2009, C060166 [nonpub. opn.]) for the background facts concerning the litigation surrounding the settlement agreement, pursuant to which attorney fees were awarded. Recitation of some if not all of these facts is necessary for context and perspective in connection with the instant appeal.

The Underlying Action and Settlement

Miller filed the underlying action following a dispute concerning real property owned by the Bushes (the property). In November 2004, the parties agreed to a settlement of that action, with, among other terms, the Bushes agreeing to pay Miller a sum certain upon their sale of the property and Miller agreeing to dismiss the action with prejudice. The parties recited the terms of their agreement on the record before the trial court, and it was later memorialized in a document entitled "Notice of Lien and First Right of Refusal," which was signed by the parties and recorded in January 2007.² The court ordered that the parties' settlement agreement was "going to become the judgment of the court[,]" but no judgment was filed.

The settlement agreement contains the following attorney fee provision: "Should any legal action or proceeding arising out of or related to this Notice of Lien and Right of Refusal be brought by either BUSH or MILLER, the prevailing party shall be entitled to receive from the other party, in addition to any other relief which may be granted, the reasonable attorneys' fees, costs and expenses incurred in the action or proceeding by the prevailing party."

² We shall refer to the recorded Notice of Lien and First Right of Refusal as the settlement agreement, as it mirrors the terms agreed to orally by the parties and its creation operated to settle the underlying property dispute.

II

Miller's Motions to Enter Judgment

In December 2006, Miller filed a motion for judgment pursuant to stipulation under Code of Civil Procedure section 664.6, seeking entry of a formal judgment.³ He ultimately asked that the motion be taken off calendar.

In or about July 2007, Miller filed his second motion for judgment pursuant to section 664.6, seeking an order compelling the Bushes to sell the property to him for a set price of \$1.2 million. The Bushes opposed the motion, claiming that the settlement agreement did not oblige them to sell the property to Miller at so low a price. The trial court (Holland, J.) denied Miller's motion in a written ruling, finding: "The [settlement agreement] provides for a 'right of first refusal' on specified terms and is not, as Plaintiff argues, an unqualified 'right to purchase' anytime for a specified price. Plaintiff's right of refusal accrues 'in the event the property does not sell to any other buyer for a sales price . . . that exceeds \$1,200,000' and must be exercised within 10 days after notice from Defendants that they have a buyer. It is important to note that the settlement agreement plainly contemplated that Defendants may

³ Section 664.6 provides: "If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement. If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement."

sell the subject real property for a price in excess of \$1,200,000; indeed, the agreement recites that Defendants will pay additional compensation to Plaintiff in such an event. It appears that Plaintiff's right of refusal comes into play only if a prospective buyer offers to purchase the subject property for less than \$1,200,000. [¶] Defendants were under no obligation to accept Plaintiff's offer to purchase dated May 25, 2007, since the conditions under which Plaintiff's right of refusal had not arisen. . . . [T]he conditions under which Plaintiff may exercise his right of refusal do not presently exist."

While his motion for judgment was pending, Miller quitclaimed to the Bushes for valuable consideration "any interest [he] may have acquired in the subject property" by virtue of the settlement agreement, and the property was sold by the Bushes to a third party.

Miller then filed a third motion for judgment pursuant to stipulation under section 664.6, seeking the entry of a judgment from which he could appeal. The Bushes opposed the motion. The trial court declined to enter the proposed judgment, finding: "The court cannot order judgment be entered on behalf of Plaintiff since Defendants have satisfied their obligations under the settlement agreement. Similarly, inasmuch as Plaintiff has satisfied his obligations under the settlement agreement--except for dismissal of the action--it would be inappropriate to order entry of judgment on behalf of Defendants."

The court went on to reject Miller's interpretation of the settlement agreement. "The point of Plaintiff's motion seems to be this: Plaintiff contends that he is entitled to additional money pursuant to the parties' settlement agreement. Plaintiff contends that the settlement agreement gave him a 'right to purchase' the subject parcel for \$ 1,200,000.00 even if another buyer offered to purchase for an amount in excess of this figure. Therefore, according to Plaintiff, he is entitled to receive the difference between the actual sale price and \$1.2 million, less other sums that he has already been paid. [¶] The court has previously ruled against Plaintiff's interpretation of the settlement agreement. However, if the court is mistaken, and Plaintiff's interpretation of the settlement is correct, what is Plaintiff's remedy? It seems to the court that Plaintiff's remedy is an action for breach of contract--specifically, for breach of the settlement agreement. Alternatively, the court could order dismissal of the instant action--Defendants appear to be entitled to dismissal with prejudice as specified by the settlement agreement--and let Plaintiff appeal the court's decision." The trial court, on its own motion, ordered Miller to show cause on a specified date why the underlying action should not be dismissed with prejudice as specified by the parties' settlement agreement and, on its own motion, ordered Miller to show cause why the action should not be dismissed with prejudice.

When neither party filed opposition, the trial court ordered the dismissal of Miller's action with prejudice.

III

Miller's Appeal from the Order Dismissing the Action

Miller appealed from the order of dismissal, contending that the trial court erred in its interpretation of the settlement agreement. In an unpublished opinion, this court rejected Miller's contention that the trial court erred. We affirmed the trial court's order dismissing Miller's motion and awarded costs on appeal to the Bushes. (*Miller v. Bush* (Aug. 24, 2009, C060166) [nonpub opn.].)

IV

The Instant Attorney Fee Order

After this court issued its opinion affirming the trial court's order dismissing the action, the Bushes filed the instant motion seeking a determination that they were the parties "prevailing on contract for purposes of Civil Code § 1717" and fixing the amount of attorney fees.⁴

In support of the motion, the Bushes' counsel submitted a declaration in which he averred that Miller based his appeal from the court's denial of his motion to enter judgment on an assertion "that [the trial] court misconstrued the meaning of

⁴ In the interim, this court issued a nonpublished opinion reversing the trial court's award to the Bushes of attorney fees of \$8,337.50 in obtaining a dismissal of Miller's first appeal. (*Miller v. Bush* (July 27, 2010, C061459) [nonpub opn.].) In that opinion, we agreed with Miller that the trial court's determination following the dismissal of Miller's first appeal that the Bushes were the prevailing party in connection with the dismissed appeal was premature.

the stipulated settlement set forth in the 'Notice of Lien and First Right of Refusal,'" and that document provided that in any proceeding related to it, the prevailing party shall be entitled to recover attorney fees. He averred that the following attorney's fees "have been incurred":

"Bart Barringer @ \$350.00/hr. 18.25 hours\$ 6,387.50
"Paralegal fees \$ 125.00/hr. 28.5 hours\$ 3,531.25
"Future attorney fees 1.5 hours\$ 525.00
"Future paralegal fees 4.0 hours	\$ 500.00
"TOTAL ATTORNEY FEES \$ 10,943.75.	

"These fees are for time spent in research and drafting an opposition to [Miller]'s appeal to this motion, traveling to and from the hearing on this motion, and preparing an Order After Hearing. I estimate said fees will include an additional 1.5 hours at a rate of \$350.00/hour and 4.0 hours at a rate of \$125.00/hour."

At the same time, the Bushes filed a memorandum of costs on appeal, in which they sought \$10,943.75 in attorney fees as an item of costs. Miller opposed the Bushes' motion for attorney fees and simultaneously moved to strike the attorney fee claim in the cost memorandum. The trial court denied Miller's motion to strike or tax attorney fees as an element of costs, granted the Bushes' motion as to "current fees totaling \$9,918.75" plus costs, and denied their claim for "future" or anticipated fees.

Miller now appeals, both from the order denying his motion to strike attorney fees from the memorandum of costs and from the order awarding the Bushes attorney fees.

DISCUSSION

I

Standard of Review

On appeal, this court reviews a determination of the legal basis for an award of attorney fees de novo as a question of law. (*Sessions Payroll Management, Inc. v. Noble Construction Co.* (2000) 84 Cal.App.4th 671, 677; *Exarhos v. Exarhos* (2008) 159 Cal.App.4th 898, 903.)

II

Motion for Attorney Fees

The only attorney fees at issue here are those arising from this court's award of costs on appeal to the Bushes, after they prevailed in Miller's appeal from the dismissal of the action. (*Miller v. Bush* (Aug. 24, 2009, C060166) [nonpub. opn.] .)

"Whether a party to litigation is entitled to recover costs is governed by [] section 1032, which provides, in subdivision (b), that '[e]xcept as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding.'" (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 606.) For the purpose of determining entitlement to recover costs, section 1032 defines "prevailing party" as including, among others, "a defendant in whose favor a dismissal is entered." (§ 1032, subd. (a)(4).)

Contractually authorized attorney fees are recoverable costs under section 1033.5, subdivision (a)(10) which provides that a prevailing party is entitled to recover as costs

"Attorney's fees, when authorized by any of the following: (A) Contract. (B) Statute. (C) Law." When authorized by contract, the right to attorney fees is made reciprocal by Civil Code section 1717. (*Butler-Rupp v. Lourdeaux* (2007) 154 Cal.App.4th 918, 923.)

If recoverable either under contract, statute, or law, attorney fees may be recovered both for services rendered at trial, and also on appeal. (*Schaffter v. Creative Capital Leasing Group, LLC* (2008) 166 Cal.App.4th 745, 759; *Morcos v. Board of Retirement* (1990) 51 Cal.3d 924, 927; see also *Butler-Rupp v. Lourdeaux, supra*, 154 Cal.App.4th at p. 925.) If the appellate court awards costs on appeal, but makes no express provision for attorney fees, the party to whom costs on appeal were awarded may seek them in the superior court. (Cal. Rules of Court, rule 8.278 (d)(2); *Butler-Rupp v. Lourdeaux, supra*, 154 Cal.App.4th at p. 925 [citing former rule].) Although the appellate court has the power to fix attorney fees on appeal, the better practice is to have the trial court determine such fees, as happened here. (*Security Pacific National Bank v. Adamo* (1983) 142 Cal.App.3d 492, 498.)

To request appellate attorney fees based on a contract in the trial court, California Rules of Court, rule 3.1702 prescribes a noticed motion procedure. At the time of the Bushes' request, rule 3.1702 (c)(1) stated: "A notice of motion to claim attorney's fees on appeal -- other than the attorney's fees on appeal claimed under (b) [fees before trial court judgment] -- under a statute or contract requiring the court to

determine entitlement to the fees, the amount of the fees, or both, must be served and filed within the time for serving and filing the memorandum of costs” (See Cal. Practice Guide: Appeals and Writs (The Rutter Group 2010) ¶¶ 14:120 - 14:121, 14:122.8.) These provisions have been interpreted to mean that contractual attorney fees are to be claimed only by noticed motion, not by the mere filing of a memorandum of costs. (*Id.* at ¶ 14:121 and cases cited therein.)

Notwithstanding Miller’s suggestion to the contrary, the Bushes did not fail to comply with the requirement that they file a noticed motion for attorney fees.

III

The Bushes’ Entitlement to Attorney Fees

The question we are asked to answer at this particular juncture is whether the Bushes were entitled to an award of appellate attorney fees by virtue of their having prevailed in defeating Miller’s effort to reinstate the underlying action and/or obtain an order enforcing his interpretation of the settlement agreement. The answer is yes.

Generally, an action to enforce a settlement agreement containing an attorney fee provision or an action seeking to enjoin its continuing breach, constitutes an “action on a contract” within the meaning of Civil Code section 1717, for which attorney fees may be properly awarded. (*Baugh v. Garl* (2006) 137 Cal.App.4th 737, 742.) Here, Miller contends that no attorney fees may be awarded based on his failed efforts to enforce the settlement agreement because he brought a *motion*,

not an "action," and Civil Code section 1717 allows contractual attorney fees only if the Bushes had prevailed in "an action" on a contract.⁵

"The purpose of section 664.6 'is to permit a court, via a summary proceeding, to finally dispose of an action when the existence of the agreement or the terms of the settlement are subject to reasonable dispute, something not permissible before the statute's enactment. [Citation.]'" (*Viejo Bankcorp, Inc. v. Wood* (1989) 217 Cal.App.3d 200, 206 (*Viejo*).) Prior to its enactment, a party who sought to enforce a settlement agreement would file a separate suit or seek permission to file a supplemental pleading in the original suit. (*Viejo, supra*, 217 Cal.App.3d at p. 208.)

Miller alone is responsible for his election to attempt enforcement of his (erroneous) interpretation of the settlement agreement by *motion* under section 664.6, rather than by initiating a new, separate, *action* for enforcement of that agreement. He was able to proceed by motion only because he had failed or refused to dismiss the underlying lawsuit against the Bushes, despite the fact that the settlement agreement obliged him to do so. Had Miller dismissed the underlying lawsuit with prejudice as required by the settlement agreement, the trial

⁵ Miller also asserts that the attorney fee clause in the settlement agreement "was never intended to apply to this already pending lawsuit." However, he admits that the only evidence on this point is a declaration authored *by him*, which is *not a part* of the record on appeal. We decline to consider matters alleged to have occurred outside the record on appeal.

court would have lost jurisdiction, and Miller would have had to seek enforcement of the settlement agreement by bringing a new action. He could not have then challenged the Bushes' attorney fee award on the ground that they had not prevailed in a separate "action" on a contract. (See *Hagan Engineering, Inc. v. Mills* (2003) 115 Cal.App.4th 1004, 1011.)

In resolving an attorney fees motion, the trial court should consider the theories asserted, among other things. (*Lerner v. Ward* (1993) 13 Cal.App.4th 155, 158.) It is clear from our opinion in *Miller v. Bush* (Aug. 24, 2009, C060166) [nonpub opn.], in which we upheld the trial court's dismissal of the underlying property dispute, that Miller's appeal had nothing to do with the underlying lawsuit regarding the property, and everything to do with Miller's attempt to enforce his interpretation of the settlement agreement. (See *Texas Commerce Bank v. Garamendi* (1994) 28 Cal.App.4th 1234, 1246-1247; cf. *Silverado Modjeska Recreation and Park Dist. v. County of Orange* (2011) 197 Cal.App.4th 282, 310-312.) Miller's appeal thus represented a "proceeding arising out of or related to [the settlement agreement] brought by either BUSH or MILLER," (*Ramirez v. Sturdevant* (1994) 21 Cal.App.4th 904, 918 ["prosecuting on appeal is a proceeding discrete from proceedings in the trial court"]) and the Bushes were entitled to reasonable attorney fees after they prevailed.

Considering all of the circumstances surrounding this particular fee award, we agree with the trial court that the Bushes were entitled to recover attorney fees under the attorney

fee provision of the settlement agreement as prevailing parties on appeal.

Miller's remaining challenges to the attorney fee award are also unavailing.

Miller suggests that the "short declaration" submitted by the Bushes' attorney in support of the motion for attorney fees was somehow inadequate to support the motion. The court did not err in relying upon the declaration; no further evidence was required. (See *Steiny & Co. v. Cal. Elec. Supply Co.* (2000) 79 Cal.App.4th 285, 293.)

Nor did the trial court err in rejecting Miller's argument that the declaration submitted by the Bushes' attorney failed to show that the Bushes had "actually incurred" the accrued attorney fees within the meaning of *Trope v. Katz* (1995) 11 Cal.4th 274, 277 (*Trope*).

In *Trope*, the state high court concluded a law firm that represented itself in litigation against its client for breach of contract was not entitled to attorney fees. Although the contract between the parties contained a provision for attorney fees, and Civil Code section 1717 permits the recovery of reasonable attorney fees incurred to enforce a contract that contains an attorney fees clause, the law firm had not "incurred" attorney fees in representing *itself*. (*Trope, supra*, 11 Cal.4th at p. 292.) The *Trope* court explained the reasonable and ordinary meaning of "incur" is to become liable for or obligated to pay and the normal meaning of attorney fees is the consideration a litigant becomes liable to pay for legal

representation. (*Trope, supra*, at p. 280.) Here, nothing in the record suggests the Bushes were somehow *not* obliged to pay the fees accrued by their attorney in defeating Miller's appeal from the dismissal of the underlying lawsuit.

DISPOSITION

The order awarding attorney fees is affirmed. The Bushes shall recover their costs and attorney fees on appeal as determined by the trial court. (Cal. Rules of Court, rule 8.278(a)(1).)

DUARTE, J.

We concur:

ROBIE, Acting P. J.

BUTZ, J.